

NO. 46775-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JAMES ANTHONY BROWN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 14-1-00648-7

SUPPLEMENTAL BRIEF OF RESPONDENT

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DATED August 7, 2015, Port Orchard, WA 
Original e-filed at the Court of Appeals; Copy to counsel listed at left.
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I. COUNTERSTATEMENT OF THE SUPPLEMENTAL ISSUE

Whether this Court should consider Brown's claim regarding the \$1,235 in discretionary legal financial obligations where Brown waived that issue when he failed to object at sentencing?

II. SUPPLEMENTAL STATEMENT OF THE CASE

The State relies on its original statement of the case, and supplements it as follows.

At sentencing, Brown in no way objected to or even referenced the imposition of legal financial obligations. RP (10/10) 6-8.

The court sentenced Brown to forty-seven months in jail and imposed a total of \$2,035 in legal financial obligations in the judgment and sentence:

\$500	Victim Assessment
\$1,135	Court-appointed attorney fees
\$200	Filing Fee
\$100	DNA/Biological Sample Fee
\$100	Kitsap County Expert Witness Fund

CP 104, 108. No restitution was ordered. CP108.

III. SUPPLEMENTAL ARGUMENT

THIS COURT SHOULD DECLINE TO REVIEW AN UNPRESERVED CLAIM REGARDING LFO'S WHEN DEFENDANT WAS ON NOTICE OF THE COURT OF APPEALS DECISION IN *STATE V. BLAZINA*.

For the first time on appeal, Brown challenges the court's imposition of legal financial obligations, arguing that there is insufficient evidence of his present or future ability to pay, citing *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). Three of the five legal financial obligations were mandatory and are unaffected by the decision in *Blazina*.¹ The court should decline to consider the remaining amounts, for attorney's fees and for the county expert witness fund, because Brown failed to object at sentencing, despite being put on notice by this court's decision in *State v. Blazina*, 174 Wn. App. 906, 301 P.3d 492 (2013).

In its 2015 *Blazina* opinion, the Washington Supreme Court specifically held that it is not error for this Court to decline to reach the merits on a challenge to the imposition of LFOs made for the first time on appeal. *Blazina*, 182 Wn.2d at 832. "Unpreserved LFO errors do not command review as a matter of right under *Ford* and its progeny."

¹ Three of the five LFOs ordered by the trial court were mandatory, and do not come within the reach of *Blazina*, which by its terms only applies to discretionary awards. See RCW 7.68.035(1)(a) (victim assessment); RCW 36.18.020(2)(h) (filing fee); RCW 43.43.7541 (DNA fee). These fees are mandatory, not discretionary. *State v. Lundy*, 176 Wn. App. 96, 102-103, 308 P.3d 755 (2013) ("For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account.").

Blazina, 182 Wn.2d at 833 (citing *State v. Ford*, 137 Wn.2d 472, 478, 973 P.2d 452 (1999)). The decision to review is discretionary with the reviewing court under RAP 2.5. *Blazina*, 182 Wn.2d at 835. In *State v. Duncan*, 180 Wn. App. 246, 327 P.3d 699 (2014), the court held that defendant's failure to object was not because the ability to pay LFOs was overlooked; rather, the defendant reasonably waived the issue, considering "the apparent and unsurprising fact that many defendants do not make an effort at sentencing to suggest to the sentencing court that they are, and will remain, unproductive" *Duncan*, 180 Wn. App. at 250, 253. *Duncan* remains good law, and reflects the policy embodied by RAP 2.5(a), a policy that encourages the efficient use of judicial resources and discourages late claims that could have been corrected with a timely objection. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988).

Here, Brown failed to object at sentencing. Furthermore, Brown is in a nearly identical position to the defendant in *State v. Lyle*, ___ Wn. App. ___, 2015 WL 4156773 (July 10, 2015). There, this court refused to address Lyle's LFO claim, holding that Lyle was on notice regarding waiver of *Blazina* issues. "Our decision in *Blazina*, issued before Lyle's March 14, 2014 sentencing, provided notice that the failure to object to LFOs during sentencing waives a related claim of error on appeal." *Lyle*, ___ Wn. App. at ¶ 10. Brown was sentenced on October 10, 2014, so he

too had notice, and still failed to object.² This court should therefore decline to review this issue.

Moreover, though Brown, in supplemental briefing, now speculates that a *Blazina* inquiry would have weighed heavily against a finding of ability to pay, nowhere does the record support his contention. Brown fails to cite to any fact pertaining to his alleged lack of assets, or to his assertion that his children are his dependents. App.'s Supp. Brief, 3-4. To the contrary, Brown himself informed the court that he works hard, and that he needed the court to impose less time in custody so that he could "get back out to work." RP (10/10) 7-8. There is therefore no obvious error on the record, the matter was not preserved for review, and the court should not consider the issue of LFOs for the first time on appeal.

² Though not raised Brown, it follows that there is a potential claim of ineffective assistance of counsel. However, even assuming, *arguendo*, deficient performance on this issue, Brown must further show that he was prejudiced. Just as in *Lyle*, there are no additional facts in the record in this case that would allow the court to determine whether the trial court would have imposed fewer or no LFOs if defense counsel had objected. Because Brown must establish prejudice on the record below and the record is not sufficient for the court to determine whether there is a reasonable probability that the trial court's decision would have been different, a claim of ineffective assistance of counsel on this basis must fail. See *Lyle*, ___ Wn. App. at ¶¶ 14-15.

IV. CONCLUSION

For the foregoing reasons and those set forth in the original brief of respondent, Brown's conviction and sentence should be affirmed.

DATED August 7, 2015.

Respectfully submitted,
TINA R. ROBINSON
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A handwritten signature in black ink, appearing to read "Benjamin S. Turner", with a stylized flourish at the end.

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August 07, 2015 - 9:44 AM

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